Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHARP ELECTRONICS CORPORATION
Petitioner,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 16, 2000

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QUESTION PRESENTED

In the United States District Court for the District of Maryland, Petitioner filed a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure. Over the opposition of Respondent, the District Court granted the Motion, and Respondent appealed. On appeal, the United States Court of Appeals for the Fourth Circuit struck the District Court's order granting summary judgment in favor of Petitioner and ordered entry of judgment *sua sponte* in favor of Respondent.

Did the Court of Appeals panel have the power to order, on its own initiative, the entry of summary judgment for Respondent?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following is a complete of all corporate affiliates of Sharp Electronics Corporation:

Sharp Corporation

Sharp Laboratories of America, Inc.

Sharp Electronics Manufacturing Company of America, Inc.

Sharp Electronics Manufacturing Company of Mexico, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12
Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533 (1991) 9
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11-13
Fountain v. Filson, 336 U.S. 681 (1949) 11
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 11
Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) 13
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 12
Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) 9
Armijo v. Atchison, Topeka & Santa Fe Ry. Co., 27 F.3d 481 (10th Cir. 1994) 14
Latecoere Int'l, Inc. v. United States Dep't of Navy, 19 F.3d 1342 (11th Cir. 1994) 14, 15

RULES

Fed. R. Civ. P. 56 8-15
Sup. Ct. R. 10 8

TREATISES

4 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1006 (2d ed. 1987) 11
10A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2720 (3d ed. 1998) ... 11, 14
11 James Wm. Moore, *Moore's Federal Practice* § 56App.03[1] and [2] (3d ed. 2000) 11

ARTICLES

John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985) 9

TABLE OF AUTHORITIES

Page

Samuel Issacharoff and George Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73 (1990) 13

Judith Resnick, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982) 9

Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998) 12

PETITION FOR A WRIT OF CERTIORARI

Sharp Electronics Corporation ("Sharp") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

. The opinion of the United States Court of Appeals for the Fourth Circuit, filed June 20, 2000, is reported at 215 F.3d 388 and is set forth in Appendix C. The Order of the United States Court of Appeals for the Fourth Circuit, denying Sharp's Petition for Panel Rehearing, is included herein as Appendix D. The Opinion and Order of the United States District Court for the District of Maryland granting Petitioner's Motion for Summary Judgment, filed January 29, 1999, is set forth in this Petition as Appendix A. The Opinion and Order of the United States District Court for the District of Maryland denying Respondent's Motion to Alter or Amend Judgment, filed April 14, 1999, is included in Appendix B.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit denying Sharp's Petition for Panel Rehearing was filed on July 18, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move

with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

The Business Context

Petitioner, Sharp Electronics Corporation ("Sharp"), a New York corporation, with its principal place of business in Mahwah, New Jersey, sells Sharp-brand electronics products and accessories at wholesale to third-party retail dealers. Respondent, Deutsche Financial Services Corporation ("Deutsche Financial"), is a Nevada corporation with its principal place of business in St. Louis, Missouri. Deutsche Financial is a subsidiary of Deutsche Bank North America Holding Corp. Deutsche Financial enters into ongoing arrangements with wholesalers such as Sharp to finance purchases of their products made by third-party retail dealers. Sharp and Deutsche Financial entered into an omnibus Floorplan Repurchase Agreement in 1991, continuing a 1985 Agreement between the same parties. Montgomery Ward and Co., Inc., a third-party retail dealer of Sharp, has long been a significant and continuous purchaser of products from Sharp, and those purchases were financed by Deutsche Financial under the Agreement beginning in 1993.

Trial Court Proceedings

On January 27, 1998, Sharp filed a one-count complaint against Deutsche Financial in the United States District Court for the District of Maryland under 28 U.S.C. § 1332(a)(1) and (c) alleging breach of contract in an amount determined to be $1,297,400.10. Deutsche Financial refused to pay Sharp for literally dozens of purchase orders, specifically approved by Deutsche Financial, for products already shipped to Montgomery Ward by Sharp, and already invoiced under the Agreement to Deutsche Financial. The relevant time bracket for all of this was Friday May 23 through Wednesday May 28 (with the Memorial Day holiday weekend intervening) and on to July 7, 1997. The latter date is when Montgomery Ward

filed as a debtor, for protection under Chapter 11 in the United States Bankruptcy Court for the District of Delaware.

The Sharp case was assigned to the Honorable Andre M. Davis of the District Court in Baltimore. After disposing of some preliminary matters, Judge Davis denied Deutsche Financial's Motion to Dismiss by Memorandum Opinion and Order dated June 3, and entered a Scheduling Order the next day setting the case for a two-week, non-jury trial to begin on December 14, 1998. The Order required that "[d]ispositive pretrial motions" be filed six weeks before trial and discovery close thirty days before that. Judge Davis established a deposition limit of 22 hours for each party. Sharp filed a timely "[d]ispositive" Motion for Summary Judgment, accompanied by an extensive Memorandum in Support and a bound volume of exhibits. Deutsche Financial filed neither a motion for summary judgment nor a cross motion. It did file a sizeable Memorandum in Opposition to Sharp's Motion, with accompanying exhibits. The estimate of trial days needed for the case was shortened at that point by counsel to three, and the trial was continued until after a ruling upon Sharp's Motion.

On January 29, 1999, in a Memorandum Opinion and Order, Judge Davis granted Sharp's Motion for Summary Judgment, finding that Deutsche Financial had breached its contract with Sharp, and awarded Sharp a total of $1,394,705.11, including pre-judgment interest at 5% per annum (the legal rate in Illinois, whose law applied). App. 11a. Deutsche Financial filed a Motion to Alter or Amend Judgment on February 12, 1999, which was denied on April 14 by Judge Davis in a further Memorandum Opinion and Order. App. 27a.

In its filings opposing, and seeking to alter, Sharp's summary judgment, Deutsche Financial stated that it "did not bring a cross motion . . . [b]elieving that there are disputes of material fact" and urged that "the matter [be] set in for trial

on the merits." In the same vein, Deutsche Financial repeatedly castigated Judge Davis for in its view "deciding . . . disputed issues of fact and credibility." Respondent Deutsche Financial held to the identical course in its presentation of each of its issues in its two briefs on appeal, concluding both with the near-identical request that the Court "reverse the District Court's entry of judgment as a matter of law and remand this case for trial."

Appellate Court Proceedings

The Court of Appeals panel[1] in its opinion, released on June 20, 2000, veered onto an entirely new course. It found that the 1991 Agreement between Sharp and Deutsche Financial was in reality "a unilateral promise by Sharp that invited Deutsche Financial's acceptance by performance—i.e., by financing transactions." App. 36a. It went on to find that an acceptance of that "unilateral promise" occurred whenever Deutsche Financial approved each particular financing request from Sharp. But the opinion further embroidered that contract by finding that Deutsche Financial's "acceptance by performance," by way of its approval, was nonetheless "conditional on additional [subsequent] acts by Sharp": namely shipment of the ordered products to Montgomery Ward within 30 days of the "approval"; and receipt by Deutsche Financial within 10 days of that "approval" of an invoice from Sharp for the products shipped. App. 39a-40a.

By this legerdemain the court was in a position to find that Deutsche Financial was within its contractual rights to suddenly shorten on May 27, 1997 Sharp's shipping

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[1] Judges Paul V. Niemeyer, Circuit Judge; Roger J. Miner, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation; and Joseph R. Goodwin, United States District Judge for the Southern District of West Virginia, sitting by designation.

"condition" from 30 days to 2 business days (expiring May 28), despite Deutsche Financial's earlier approval of all of the submitted purchase orders by the end of the prior week. Thus, Deutsche Financial was absolved by the court of all liability for any Sharp shipment commenced even one day after May 28 (as a number were), despite Deutsche Financial's specific approval of all of the invoices in question back on May 23.

The court then vacated Sharp's summary judgment of $1,394,705.11 on the strength of the "undisputed facts of record," and on those same facts instructed Judge Davis "to enter judgment . . . as a matter of law . . . in favor of Deutsche Financial." App. 46a.

The panel opinion ignored Deutsche Financial's sequential arguments in support of remand as well as its pleas for trial. It then re-assembled the limited facts available from the materials put together for Sharp's summary judgment and fitted them into its newly minted legal theory of contract. The result was a form no doubt entirely unrecognizable by Deutsche Financial. More to the point, the panel opinion on its own weaved for Deutsche Financial, out of whole cloth, a summary judgment motion it had neither requested nor suggested the theory for. The opinion then considered that motion and granted it, entering a windfall judgment in favor of Deutsche Financial.

Petitioner Sharp had no opportunity, at trial or on appeal, to respond to that phantom motion. Had that opportunity been provided, Sharp would have assembled the materials necessary to meet it head-on. Left with little choice, Sharp filed a Petition for Panel Rehearing, which was denied by Order entered on July 18, and the judgment of the Court of Appeals took effect on July 26, 2000.

REASONS FOR GRANTING WRIT

This Honorable Court will grant a petition for writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. An instance of when "an exercise of [the] Court's supervisory powers" is "call[ed] for" arises when "a United States court of appeals . . . has . . . departed," by a wide margin, "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). Petitioner Sharp Electronics Corporation asserts that the action of the Court of Appeals panel, in one fell swoop, vacating with no notice Sharp's summary judgment—and replacing it at the same moment with a summary judgment in favor of Respondent Deutsche Financial, never sought by Deutsche Financial—is a textbook illustration of just such a "depart[ure]."

That decision of the appeals panel to fashion and enter summary judgment on its own initiative finds no support in the language, structure, or history of Rule 56 of the Federal Rules of Civil Procedure. Under the Rule "part[ies] seeking to recover upon a claim" or "against whom a claim is asserted . . . may . . . move for summary judgment in [that] party's favor . . ." Fed. R. Civ. P. 56(a). The Rule's meticulously calibrated summary judgment standards, requirements, and procedures neither provide for, nor by any stretch can be read to imply, the possibility of a "judicial motion." It is instructive that in 1955 this Court's Advisory Committee proposed a specific one-sentence amendment to Rule 56(c) which would have for the first time permitted a court-initiated summary judgment grant. But that proposal, and a number of others, from the Committee was not adopted by this Court, and has never been reconsidered.[2] Most fundamentally, an out-of-the-blue judicial grant of summary judgment disrupts entirely the orderly progress of a case to conclusion and

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[2] *Infra* at 10-11.

entirely deprives the party against whom that judgment is entered of the opportunity to present the countering factual material assured to that litigant by Rule 56 and by this Court's rulings. Such a *sua sponte* grant thus fails utterly the most basis test of fairness.

The panel's ruling evidences a disregard for the value of "trial-testing" in our adversarial system, by which parties through their attorneys advance the positions believed to hold the most promise for their cause. Commentators such as Professor Langbein have trumpeted to us the superiority of the civil law system of case resolution, under which "the waste and distortion of adversary fact-gathering . . . [by] adversary tricksters" is avoided by "assigning judges rather than lawyers to investigate the facts . . . ." *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 824, 866 (1985). Professor Resnick has styled the trend in this country as "managerial" judging. Judith Resnick, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982). But a tectonic shift in our jurisprudence of that enormity could find its source, of course, only at this Court. And the vehicle for any such change would be significant revisions by the Court to the Federal Rules of Civil Procedure. It cannot be accomplished piecemeal and incrementally by any panel of a lower court, acting on its own.

1. *The Language of Rule 56.* As this Court has stated on numerous occasions, it is axiomatic that the plain meaning of a statute or rule is the primary tool of interpretation. *See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning."). The Court has held that "[a]s with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous." *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540-41 (1991). Rule 56 sets forth a highly structured

framework within which federal trial courts must consider and decide motions for summary judgment. The summary judgment rule provides for two paths by which a motion for it may be brought before the court. Under Rule 56(a), "[a] *party seeking to recover upon a claim*, counterclaim, or cross-claim or to obtain a declaratory judgment *may*, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by an adverse party, *move* with or without supporting affidavits *for a summary judgment in the party's favor* upon all or any part thereof." Fed. R. Civ. P. 56(a) (emphasis added). In like measure, Rule 56(b) provides that "[a] *party against whom a claim*, counterclaim, or cross-claim *is asserted* or a declaratory judgment is sought *may*, at any time, *move* with or without supporting affidavits *for a summary judgment in the party's favor* as to all or any part thereof." Fed. R. Civ. P. 56(b) (emphasis added).

It could not be more clear that it is the parties to the litigation who trigger the point-counterpoint of summary judgment tactics. Protection in this process from judicial surprise is provided as well to the parties by Rule 56(c): "[t]he motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Fed. R. Civ. P. 56(c). We have seen that nothing in the Rule can be read to authorize the entry by a court *sua sponte* of a summary judgment. The corollary, we now see, is that no summary judgment may be entered at any point in the proceedings without notice, hearing, and an opportunity to defend against it.

2. *The Legislative History*. The evolution of Rule 56 establishes that it never has authorized courts to enter summary judgments *sua sponte*. The October, 1955 Final Report to this Court from its Advisory Committee proposed amendments to a number of federal rules, including the

addition of one sentence at the tail-end of Rule 56(c). That amendment read, "[s]ummary judgment, when appropriate, may be rendered *against the moving party*." (emphasis added). That proposal was not adopted by this Court, which "took no action" on the Report and a year later "entered an order discharging the Advisory Committee." 352 U.S. 830 (1956); 4 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1006, at 34 (2d ed. 1987); 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720, at 352 (3d ed. 1998). The unadopted amendment would, of course, have "allow[ed] summary judgment to be granted against the party who has moved therefor. . . ." [3] 11 James Wm. Moore, *Moore's Federal Practice* § 56App.03[1] and [2] (3d ed. 2000).

This Court has reminded us that " '[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)). The Court may at some point wish to take a second look at the proposal made to it by its Advisory

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[3] Professor Moore's note states that the amendment would have " . . . codifie[d] a result already achieved by most federal courts." *Id.* 11 James Wm. Moore, *Moore's Federal Practice* § 56 App. 03[2]. Those courts, of course, had acted in all instances without authority under Rule 56. While a plurality of this Court has acknowledged in *dictum* that district courts "possess power to enter summary judgment *sua sponte*" in limited circumstances, *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), the Court likewise has long held it improper to enter summary judgment *sua sponte* where the losing party did not have "occasion in the trial court . . . to dispute the facts material" to the decided claim. *Fountain v. Filson*, 336 U.S. 681, 683 (1949) (per curiam).

Committee, forty-five years ago. Until then, the prerogative of initiating a summary judgment motion remains with the parties to the litigation, not with the court in its unseemly role of an omniscient overlord.

3. *Practice and Policy.* For nearly a half-century after the advent in 1937 of the Federal Rules of Civil Procedure, "[t]he prevailing wisdom . . . was that summary judgment was the exception, not the rule, and courts were expected to be tougher on the movants than on the parties resisting it." Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1906 (1998). Until then, federal courts had put movants to the daunting task of "point[ing] to actual evidence in the record showing an absence of a disputed issue of material fact." *Id.* In 1986, however, this Court, in furtherance of the 1963 amendments it had adopted clarifying Rule 56(c), provided a broad reading to the Rule decidedly in favor of parties seeking to extinguish opposing parties' cases on summary judgment. This was accomplished in the well-known trilogy of decisions: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Celotex in particular adjusted significantly the burden of production placed on movants and nonmovants. The Court held that a party seeking summary judgment bears only "the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). *Celotex* established that the moving party merely has the burden of " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. In

countering a properly supported motion for summary judgment, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)).

Put another way, *Celotex* places "the burden of production upon the nonmovant to come forward with evidence of the full range of facts in dispute," in order to successfully fend off a properly presented motion for summary judgment. Samuel Issacharoff and George Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 83 (1990). This Court, in *Celotex*, "fundamentally altered" summary judgment jurisprudence by "eas[ing] the initial burden placed on the party moving for summary judgment by permitting a summary judgment movant to prevail without having to establish the nonexistence of material facts in dispute." *Id.* at 79; *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990) ("*Celotex* made clear that Rule 56 does not require the moving party to negate the elements of the nonmoving party's case.").

It is of fundamental importance that, at the same time, the burden-shifting mechanism established by the *Celotex* Court clarified an essential and valuable safeguard for nonmovants. The result is that once a movant has satisfied its burden by "showing" the court that there is an absence of any disputed material fact, nonmovants then are provided a full opportunity to bring forth any evidence of disputed issues of fact, to counter each argument presented by the moving party. In making the case against summary judgment, the nonmovant has before it each issue confronting it and to which it must respond convincingly. A judicial decision to grant summary judgment *sua sponte* short-circuits this process and renders meaningless the protections which *Celotex*'s shifting burdens provide to nonmovants. *See*

Latecoere Int'l, Inc. v. United States Dep't of Navy, 19 F.3d 1342, 1366 (11th Cir. 1994) (noting the danger of directing summary judgment *sua sponte* where a "party will be deprived of notice and an opportunity to respond not only with argument, but also with evidence"); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 27 F.3d 481, 483 (10th Cir. 1994) (withdrawing entry of summary judgment for non-moving party and remanding the case to the trial court to avoid working "procedural prejudice" to the moving party).

When a court enters summary judgment in the absence of a fully briefed Rule 56 motion, the risk increases materially that there are relevant contested issues of material fact well beyond those in the focused and narrow record then before the court. In lieu of entering summary judgment *sua sponte*, federal trial courts may, entirely consistent with Rule 56, request a party to file a motion which would place an identified legal issue of interest to the court before it for resolution. The nonmoving party would then have the opportunity to marshal any and all facts, which it believes would preclude summary disposition—or to file a cross-motion. Appellate courts, one step removed, may remand any case in which it appears that the nonmovant below may have been entitled to judgment as a matter of law. Once back at the trial court, the movant may be able to establish in its filings that triable issues remain with respect to that new legal issue.

A number of the federal appellate and trial courts engage haphazardly in the practice of *sua sponte* grants of summary judgment. *See generally* 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720 (3d ed. 1998). But that practice simply cannot be squared with the language and framework of Rule 56. That framework is designed to insure procedural fairness by giving the non-moving party notice and a full opportunity to respond to any motion for summary judgment. Petitioner Sharp did not have that opportunity.

See Latecoere, 19 F.3d at 1366 ("A party is entitled to notice when the record is being built that it might lose the case on that record, *see* Fed. R. Civ. P. 56(c), and entitlement to such notice is difficult to square with permitting [a] . . . court to direct entry of summary judgment against a party when such action was never requested."). The sudden grant, on appeal, of summary judgment against Sharp, never sought or suggested by Deutsche Financial at any stage, should not be permitted to stand. And this Honorable Court should announce a bright-line interpretation of Rule 56 precluding this practice. Sharp in turn should be entitled to present its case at the trial court.

CONCLUSION

Had Petitioner Sharp Electronics Corporation *not* moved for summary judgment or had that judgment *not* been entered in its favor, the trial would have been conducted and concluded at least eighteen months ago. Petitioner does not believe that it should find itself, as it now does, in a far worse position for having moved *successfully for* summary judgment. Such a result fails to accord with the plain meaning and legislative history of Rule 56 and makes threshold decisions upon whether to file hereafter for summary judgment in other cases a true Hobson's choice.

Respectfully Submitted,

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October 16, 2000

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APPENDICES

APPENDIX A

[FILED Jan 29, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD 98-253

SHARP ELECTRONICS CORPORATION
Plaintiff,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Defendant.

MEMORANDUM

This is a breach of contract action arising under Illinois law and is here based on diversity of citizenship jurisdiction. Defendant Deutsche Financial Services Corporation ("DFS") is the successor to ITT Commercial Finance Corp. ITT had an agreement with Plaintiff Sharp Electronics Corporation, denominated a Floorplan Repurchase Agreement ("the Agreement") pursuant to which, inter alia, ITT financed purchases from Sharp of electronic goods for resale by Montgomery Ward & Co., Inc. and Lechmere Co., a company acquired by Montgomery Ward. & Co., Inc. (collectively "Ward"). Pending before the court is Sharp's motion for summary judgment. No hearing is necessary. The motion shall be granted.

FACTS

In April 1991, Sharp and ITT entered into the Agreement. Under the Agreement, DFS (as ITT's successor-in-interest) financed the sale of electronic goods by Sharp to Ward.

Under the terms of the Agreement, and as the Agreement was in fact performed by the parties, after receiving an order for merchandise from Ward, Sharp would request approval for payment from DFS in advance of shipping the goods. If the approval were granted, DFS would issue so-called "approval numbers" to Sharp. Once DFS issued approval numbers for a particular order, payment by DFS to Sharp was guaranteed if (1) the goods were shipped within 30 days, and (2) the resulting invoice was presented to DFS within 10 days after delivery. The Agreement could be terminated on 30 days notice.

On April 30, 1997, Ward decided to terminate its financing arrangements with DFS and, concomitantly, to have General Electric Capital Corporation ("GE Capital") provide the financing facility. Aware that the market knew of its declining financial condition, and thus to avoid disruption to its business relationships with its suppliers, Ward insisted on secrecy in effecting the change.

Ultimately, GE Capital entered into an Assignment and Assumption Agreement with Ward and DFS. The Assignment and Assumption Agreement provided that DFS would not issue approval numbers after May 23, 1997, i.e., DFS financing would not be available to Ward after May 23, 1997; GE Capital would assume responsibility effective on May 24, 1997. Of significance here, Ward, DFS and GE Capital also agreed that DFS would be required to instruct vendors that any shipments must be made *before May 28, 1997*, even if DFS issued approval numbers on or before May 23, 1997.

This latter undertaking constituted a dramatic variance from the related provision of the Agreement which dictated the rights and liabilities as between Sharp and DFS in respect to Sharp's sales to Ward. As set forth above, under the Agreement, Sharp was obligated to ship goods within 30 days of DFS's issuance of approval numbers, not five days (to say nothing of *two business days*) as DFS's attempted

modification would have bound Sharp to perform. The gravamen of DFS's defense here is that Sharp did indeed become bound to DFS's attempted modification of the shipping provision contained in the Agreement (between Sharp and DFS). DFS contends that the following facts establish (or at the least, according to DFS, which has not moved for summary judgment, generate a genuine dispute whether) Sharp is bound by that attempted modification.

On Thursday, May 22, 1997, Ward faxed a letter to all of its vendors, including Sharp, notifying them that DFS would continue to administer its floorplan financing program through May 23, 1997, but would not issue approval numbers *after* May 23, 1997. *Significantly, Ward did not state that vendors such as Sharp must ship goods before May 28, 1997.* On Friday, May, 23, 1997, at 2:17 p.m. Central Time, Sharp received at its offices a facsimile from DFS notifying Sharp of the termination of the Ward/DFS arrangement. Specifically, DFS stated in the facsimile that it would continue to accept approval requests through May 23, 1997, but that it would not pay any invoices for goods shipped later than May 28, 1997.[1]

Each of the above facsimiles was addressed to Ronald Papke, the principal administrator at Sharp of the DFS Agreement. Papke was on vacation on both May 22 and May 23, 1997, the Thursday and Friday before the long Memorial Day weekend. Papke only saw the facsimiles upon his return

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[1] The facsimile stated as follows in pertinent part:

> "[A]ny requests for approvals after May 23, 1997 should be processed through General Electric Capital Corporation . . . . As DFS will not administer any invoices dated later than May 28, 1997, DFS hereby notifies you that DFS *will revoke* each approval number which DFS has issued for inventory which you have not shipped to Montgomery Ward. . . on or before such date."

Def.'s Exh. 13. (emphasis added).

to the office on Tuesday, May 27, 1997. *It is undisputed that no one from Sharp approved or assented to the modification of the Agreement regarding shipping dates.*

At the time that Sharp received the DFS facsimile, there were no outstanding approval numbers, but there was a pending request from Sharp for an approval number which had been received by DFS several days before Ward decided to make the change to GE Capital. Later in the afternoon on May 23, 1997, Sharp requested a second approval number. Before the close of business on the 23rd, DFS issued two approval numbers as Sharp had requested, one covering the pre-May 23 request and one covering the request which it had received that day. The goods covered by these two approval numbers had a value of $2,242,888. *Significantly, DFS did not indicate when it issued the approval numbers that payment would only be made for goods shipped no later than May 28.*

The approvals were not entered into Sharp's system until the morning of Tuesday, May 27, 1997. Sharp shipped a portion of the inventory to Ward by May 28, 1997, but it did not ship the remaining $1,297,400 worth of inventory to Ward until after May 28. All of the inventory was shipped by May 31, 1997, well within the 30-day period allowed by the Agreement.

DFS has refused to pay for the inventory shipped after May 28, 1997, on the basis that the May 23, 1997, facsimile it sent to Sharp relieved it of any obligation under the Agreement.[2]

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[2] DFS also makes a spurious argument that Sharp is not entitled to payment because it cannot show, as required by the Agreement, that Ward "requested that the transaction be financed by [DFS]." This contention is nonsensical; manifestly, Ward requested that DFS finance its purchases *through May 23, 1997*, and DFS issued the approval numbers at issue here on May 23, 1997. There is not a scintilla of evidence in the record that Ward ever stated to Sharp that Sharp must ship goods on or before May

After it learned of DFS's stance, Sharp attempted to negotiate payment directly with Ward but no agreement (or payment) resulted. Ward filed for bankruptcy on July 7, 1997.

SUMMARY JUDGMENT STANDARDS

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248. Summary judgment is also appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp.*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252; *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). Moreover, the facts, as well as the

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28, 1997 as a condition of DFS's obligation to pay Sharp. Indeed, there is affirmative evidence in the record that Ward recognizes its liability to DFS if DFS is required to pay the claim asserted in this case.

justifiable inferences to be drawn there from, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *United States v. Diebold*, 369 U.S. 654, 655 (1962); *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). The court, however, has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

I am persuaded that there is no dispute of material fact. Rather, this case turns on the application of well-settled legal principles to undisputed facts.

ANALYSIS

A venerable principle of contract law is that the modification of a contract term or terms is not valid unless both parties agree to the modification. *Village of Mundelein v. Evanger*, 269 N.E.2d 325, 327 (Ill. Ct. App. 1971)[3]; *MAJS Inv., Inc. v. Albany Bank & Trust Co*, *529* N.E.2d 1035, 1037 (Ill. Ct. App. 1988); *Robinson v. Johnson*, 1993 U.S. Dist. LEXIS 1836, *22-23 (N.D. Ill. Feb. 18 1993), *rev'd on other grounds*, 19 F.3d 359 (7th Cir. 1994). A modification is not valid unless there is an offer, acceptance, and consideration. *Robinson*, at *22-23; *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 208 (7th Cir. 1985). A contract can not be modified by one of the contracting parties without the knowledge and consent of the remaining party to the contract. *Brooks v. Village of Wilmette*, 391 N.E.2d 133, 136 (Ill. Ct. App. 1979). The requirement of consideration means that there must be a benefit to all the parties to the contract. *Marcus v. S.S. Kresge Co.*, 283 Ill. App. 556, 568 (1936). To do what one is already legally

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[3] The parties do not dispute that Illinois law applies.

obligated to do by the terms of the existing contract does not constitute consideration sufficient to support a novation. *Id.*

Application of these principles to the case at bar is straightforward. The DFS facsimile is not a novation of the Agreement because it lacks consideration. First, DFS's act of providing approval numbers on May 23, 1997, does not constitute consideration. DFS was already legally obligated to provide approval numbers to Sharp through May 23, 1997. Second, the attempt by DFS to limit its payment obligations to shipments effected no later than May 28, 1997, clearly conferred no benefit on Sharp. Instead, the attempted unilateral modification would only have provided a benefit to DFS by limiting its risk. Thus, the failure of consideration dooms DFS's theory of defense.

Moreover, even apart from the failure of consideration, as a matter of law, there was no acceptance by performance because Sharp's acts after May 23, 1997, were in every respect consistent with the existing contract. Sharp shipped all of the inventory within 30 days of approval, and invoiced the inventory within 10 days thereafter. Further, Sharp never expressed assent to the terms of DFS's May 23, 1997, facsimile. It is undisputed that DFS never even tried to obtain Sharp's consent to this modification. Therefore, because of a lack of consent and failure of consideration, DFS's attempt to modify the Agreement was ineffective.[4]

DFS also challenges Sharp's calculation of damages. Illinois law requires one who is injured by a breach of contract to make a reasonable attempt to mitigate his or her

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[4] DFS also purports to rely on the doctrine of "frustration of purpose." Illinois courts do not apply this defense liberally. *U.S. v. Southwestern Electric Cooperative, Inc.* 869 F.2d 310, 315 (7th Cir. 1989). The doctrine does not apply here because DFS has failed to show that the termination of its arrangement with Ward by the latter "was not reasonably foreseeable." *Id.*

damages. *MXL Indus. v. Mulder*, 623 N.E.2d, 369, 378 (Ill. Ct. App. 1993). Seizing on this principle, DFS seems to contend that Sharp failed to mitigate its damages because, when it realized it could not ship the goods by May 28, 1997, it should have declined to ship any goods and, instead, should merely have sued DFS for the loss of profits on such unshipped goods.[5] This contention is unpersuasive.

As a matter of law, DFS's assertion in the May 23, 1997, facsimile that it would not pay for any goods shipped after May 28, 1997, did not put Sharp on notice of an unequivocal intention on DFS's part to breach the Agreement. An anticipatory breach requires that the non-performer "manifest a definite and unequivocal intent not to render its performance." Bituminous Cas. Corp. v. *Commercial Union Ins. Co.*, 652 N.E.2d 1192, 1195, 1197 (Ill. Ct. App. 1995). The May 23 facsimile was "quick" with ambiguity: the salient portion of the facsimile recited that "DFS *will revoke* each approval number . . . for inventory which you have not shipped . . . on or before [May 28, 1997]." (emphasis added). The record shows that DFS never acted on this *warning of a future revocation of approvals* until well after the goods were shipped.

In any event, one is left to speculate: Was the facsimile an offer to make a new contract or a solicitation of an acceptance or a repudiation? Almost certainly, if Sharp had filed suit in lieu of shipping the goods Ward desired, it would have been faced with an argument by DFS that it had simply accepted the new terms offered by DFS and, recognizing it could not effect delivery within the two business days as required, had

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[5] DFS also suggests that Sharp should have sought payment from Ward and perhaps should have sought to recover the goods. Sharp did indeed negotiate (unsuccessfully) with Ward for payment, but without question Sharp had no right (or genuine opportunity pre-bankruptcy) to repossess the goods. Nor did Sharp's direct negotiations with Ward exonerate DFS.

elected not to assume the risk of non-payment by Ward *(a risk that Sharp had already bargained out from under by virtue of its a agreement with DFS).* The law does not easily embrace such a "heads I win, tails you lose" ipsie dixit. *Cf Home Exterminating Co. v. Zurich-American Ins. Group,* 921 F. Supp. 318, 323-24 (D. Md. 1996).[6]

CONCLUSION

For the reasons set forth above, plaintiff is entitled to judgment as a matter of law. Manifestly, this is a case appropriate for an award of pre-judgment interest, and I shall make such an award, at the rate of 5% per annum, as allowed by Illinois law. *See Tool Works, Inc. v. Home Indern. Co.,* 24 F.Supp.2d 851, 857-58 (N.D. Ill. 1998). An Order and Judgment follow.

Filed January 29, 1999

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

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[6] If the issue were squarely presented, I would likely conclude that, in light of Sharp's shipment of the goods by no later than May 31, 1997, and since Ward's bankruptcy is not cognizable "damage" to DFS, this case calls for the application of the maxim *de minimis non curat lex. Cf Pacini v. Regopoulos,* 665 N.E.2d 493, 497 (Ill. Ct. App. 1996).

[FILED JAN 29, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD 98-253

SHARP ELECTRONICS CORPORATION
Plaintiff,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Defendant.

ORDER

For the reasons stated in the foregoing Memorandum, it is this 29th day of January, 1999, by the United States District Court for the District of Maryland hereby ORDERED

(1) That Plaintiff's motion for summary judgment is GRANTED; and it is further ORDERED

(2) That pre-judgment interest at 5% per annum shall be awarded through December 31, 1998, twenty days after the motion for summary judgment was ready for decision; and it is further ORDERED

(3) That the Clerk of Court CLOSE THIS CASE and TRANSMIT a copy of the foregoing Memorandum, this Order and the attached Judgement to the attorneys of record.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

[FILED JAN 29, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD 98-253

SHARP ELECTRONICS CORPORATION,
Plaintiff,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Defendant.

JUDGMENT

This matter came on for consideration of Plaintiff's Motion for Summary Judgment and Defendant's Opposition thereto. The proceedings were duly considered and the Motion was granted by separate order. Accordingly, it is this 29th day of January, 1999, ORDERED

(1) That judgment is entered in favor of Plaintiff SHARP ELECTRONICS CORPORATION against Defendant DEUTSCHE FINANCIAL SERVICES CORPORATION for the sum of ONE MILLION THREE HUNDRED NINETY FOUR THOUSAND SEVEN HUNDRED FIVE AND 11/100 ($1,394,705. 11) DOLLARS, representing principal of One Million Two Hundred Ninety Seven Thousand, Four Hundred and 10/100 ($ 1,297,400.10) Dollars and pre judgment interest (at 5% from July 1, 1997 through December 31, 1998) of Ninety Seven Thousand, Three Hundred Five and 01/100 ($97,305.01); and it is further ORDERED

(2) That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated

by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

APPENDIX B

[Filed Apr 14, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD 98-253

SHARP ELECTRONICS CORP.,
Plaintiff

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Defendant

MEMORANDUM

In this breach of contract action arising under Illinois law, I granted summary judgment in favor of plaintiff by memorandum and order filed on January 29, 1999. Now pending before the court is defendant's motion to alter or amend judgment pursuant to Fed.R.Civ.P. 59. No hearing is necessary. The motion shall be denied.

(i)

Rule 59 provides authority for the grant of a new trial, but generally for only one or more of three reasons: (1) to take account of an intervening change in controlling law; (2) to allow consideration of evidence not previously available; or (3) to correct a clear error of law or prevent manifest injustice. *Weyerhauser Corp. v. Koppers Co., Inc.*, 771 F.Supp. 1406, 1419 (D. Md. 1991). The *Weyerhauser* court explained that:

> A Rule 59(e) motion "cannot be used to raise arguments which could, and should, have been made before the

> [summary] judgment issued. . . ." Nor can the motion be used to submit evidence which should have been submitted before. "[S]ummary judgment will generally not be altered or vacated on the basis of supplemental exhibits or affidavits filed after summary judgment is granted. . . . This is particularly true in a case such as this where the party seeking to amend judgment has made absolutely no showing that the additional evidence could not have been timely submitted in the exercise of reasonable diligence."

Id. (citations omitted; alterations in original). Proper application of these principles here makes plain that the motion must be denied.

(ii)

The basic, undisputed historical facts out of which this case arises are pristine in their simplicity, notwithstanding DFS's Hurculean efforts at obfuscation:

> Under the terms of the Agreement . . . [between the parties], after receiving an order for merchandise from Ward, Sharp would request approval for payment from DFS in advance of shipping the goods. If the approval were granted, DFS would issue so-called "approval numbers" to Sharp. Once DFS issued approval numbers for a particular order, payment by DFS to Sharp was guaranteed if (1) the goods were shipped within 30 days, and (2) the resulting invoice was presented to DFS within 10 days after delivery. The Agreement could be terminated on 30 days notice
>
> On April 30, 1997, Ward decided to terminate its financing arrangements with DFS and, concomitantly, to have General Electric Capital Corporation ("GE Capital") provide the financing facility. Aware that the market knew of its declining financial condition, and thus to avoid disruption to its business relationships with

its suppliers, Ward insisted on secrecy in effecting the change.

Ultimately, GE Capital entered into an Assignment and Assumption Agreement with Ward and DFS. The Assignment and Assumption Agreement provided that DFS would not issue approval numbers after May 23, 1997, i.e., DFS financing would not be available to Ward after May 23, 1997; GE Capital would assume responsibility effective on May 24, 1997. Of significance here, Ward, DFS and GE Capital also agreed that DFS would be required to instruct vendors that any shipments must be made *before May 28, 1997*, even if DFS issued approval numbers on or before May 23, 1997.

This latter undertaking constituted a dramatic variance from the related provision of the Agreement which dictated the rights and liabilities as between Sharp and DFS in respect to Sharp's sales to Ward. As set forth above, under the Agreement, Sharp was obligated to ship goods within *30 days* of DFS's issuance of approval numbers, not five days (to say nothing of *two business days)* as DFS's attempted modification would have bound Sharp to perform. The gravamen of DFS's defense here is that Sharp did indeed become bound to DFS's attempted modification of the shipping provision contained in the Agreement (between Sharp and DFS). DFS contends that the following facts establish (or at the least, according to DFS, which has not moved for summary judgment, generate a genuine dispute whether) Sharp is bound by that attempted modification.

On Thursday, May 22, 1997, Ward faxed a letter to all of its vendors, including Sharp, notifying them that DFS would continue to administer its floor plan financing program through May 23, 1997, but would not issue

approval numbers after May 23, 1997. *Significantly, Ward did not state that vendors such as Sharp must ship goods before May 28, 1997.* On Friday, May, 23, 1997, at 2:17 p.m. Central Time, Sharp received at its offices a facsimile from DFS notifying Sharp of the termination of the Ward/DFS arrangement. Specifically, DFS stated in the facsimile that it would continue to accept approval requests through May 23, 1997, but that it would not pay any invoices for goods shipped later than May 28, 1997 . . . . *It is undisputed that no one from Sharp approved or assented to the modification of the Agreement regarding shipping dates.*

At the time that Sharp received the DFS facsimile, there were no outstanding approval numbers, but there was a pending request from Sharp for an approval number which had been received by DFS several days before Ward decided to make the change to GE Capital. Later in the afternoon on May 23, 1997, Sharp requested a second approval number. Before the close of business on the 23rd, DFS issued two approval numbers as Sharp had requested, one covering the pre-May 23 request and one covering the request which it had received that day. The goods covered by these two approval numbers had a value of $2,242,888. *Significantly, DFS did not indicate when it issued the approval numbers that payment would only be made for goods shipped no later than May 28.*

The approvals were not entered into Sharp's system until the morning of Tuesday, May 27, 1997. Sharp shipped a portion of the inventory to Ward by May 28, 1997, but it did not ship the remaining $1,297,400 worth of inventory to Ward until after May 28. All of the inventory was shipped by May 31, 1997, well within the 30-day period allowed by the Agreement.

DFS has refused to pay for the inventory shipped after May 28, 1997, on the basis that the May 23, 1997,

> facsimile it sent to Sharp relieved it of any obligation under the Agreement. After it learned of DFS's stance, Sharp attempted to negotiate payment directly with Ward but no agreement (or payment) resulted. Ward filed for bankruptcy on July 7, 1997.

January 29, 1999, Order at 1-4. Nothing in DFS's motion undermines the essential accuracy of these facts.

To be sure, DFS has identified one area in which I misspoke and has quoted another portion of the Order out of context to create the impression that significant errors taint the judgment in this case. First, the 30 day notice provision in respect to any termination of the agreement bound only Sharp, not DFS as the prior Order suggested. This fact is immaterial and manifestly irrelevant to the dispute between the parties. Second, under the terms of the agreement, DFS was free to decline to issue approval numbers for any reason. Thus, the statement in the January 29, 1999, Order suggesting (when read out of context) that "[DFS] [did] what [it] already [was] legally obligated to do by the terms of [its] existing contract [when it issued approval numbers]," has been construed by DFS as a major error. It is not. In context, it is clear that I reasoned that DFS was legally obligated to comply with its agreement with Sharp, not that it was "obligated" to issue approval numbers.

Mantra-like, DFS repeats over and over that I "found facts" on summary judgment and, presumably worse still, I "found facts" "that are contrary to the undisputed evidence." I did not "find facts" when I granted summary judgment, as to do so would constitute a blatant violation of Fed.R.Civ.P. 56. Even the purported errors mentioned above, if they are errors at all, are not erroneous "findings" but are pure errors of law or in the application of law to facts. DFS's repeated assertions to the contrary do not transform legal errors into factual findings. In any event, careful consideration of DFS's complaints compels the rejection of each of them.

(iii)

Specifically, DFS argues that the judgment in favor of Sharp should be altered or amended for the following seven reasons. First, as mentioned above, the court resolved disputes of material fact. Second, the Court's conclusion that there was a failure of consideration is based upon conclusions of fact contrary to the undisputed record. Third, Sharp "failed to meet its burden of establishing every element of its claim and of negating every defense raised by DFS." Fourth, the Court shifted the burden of persuasion to DFS, the non-moving party, with regard to the "frustration of purpose" defense. Fifth, the DFS letter of May 23, 1997, constituted an anticipatory breach of the Agreement (if it constituted a breach at all), and therefore Sharp had a duty to mitigate its damages as early as May 23, 1997, which it failed to do. Sixth, the Court found that Sharp failed to secure Ward's agreement to purchase the goods in question on an open account despite evidence to the contrary. Seventh, if Sharp had no right prior to Ward's bankruptcy filing to recover the goods in question, then Sharp is in breach of the Agreement, and not entitled to summary judgment. None of these grounds offers a persuasive reason for vacating the judgment.

The May 22, 1997 Letter

DFS asserts that Ward's letter dated May 22, 1997, to Sharp is ambiguous, and that the court improperly resolved. the ambiguity in favor of Sharp, the moving party. *The letter is not ambiguous*. It informed Sharp of two things: (1) the Financing Program would be changing administrators effective May 23, 1997; and, (2) DFS would not issue approval numbers after May 23, 1997. The letter clearly means, as a matter of law (and no more and no less), that DFS *would continue* to issue approval numbers through May 23, 1997, and that GE Capital would finance goods ordered after May 23, 1997.

The Purported Dispute of Fact Re: Gathany and Guiliano

DFS contends that in granting summary judgment the court erroneously and inappropriately made factual determinations regarding Douglas Gathany's credibility by rejecting his affidavit testimony in favor of the testimony of Anthony R. Guiliano. This contention misses its mark.

During the relevant time period Gathany was Ward's Treasurer. Gathany was not a corporate designee for Ward for the purposes of this lawsuit. Gathany testified (in an artfully-crafted but essentially irrelevant affidavit) that Ward never requested Sharp to finance purchases of merchandise shipped after May 28, 1997, through DFS. Def.'s Opp. Pl.'s Mot. Sum. J., Ex. 11, ¶ 5. Gathany also stated that Ward authorized DFS to finance its purchases after May 22, 1997, only to the extent that approvals for such financing were transmitted to the vendors on May 23, 1997. *Id.* at ¶ 4. DFS relies on these statements to support its contention that Ward's letter notified Sharp that it would not authorize financing for goods shipped after May 28, 1997.

Anthony R. Giuliano was an Assistant Treasurer at Ward and was one of Ward's corporate designees for the purposes of this lawsuit. Giuliano testified on deposition that "the DFS program was going away on May 23, and subsequent to that approvals would be handled through GEC." Pl.'s Rep. Def.'s Opp. Pl.'s Mot. Sum. J., Ex.2 at 75.[1] *Giuliano also testified that if DFS has paid Sharp for the goods at issue in this case, Ward would have been obligated under the Agreement to pay DFS. Id.*, Ex. 2 at 87. Sharp points to this testimony as support for its contention that the Financing Program could not have terminated until the close of business on May 23.

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[1] Page 75 of the Guiliano deposition has been inadvertently omitted from Sharp's exhibit containing excerpts thereof, but DFS has not disputed the accuracy of Sharp's quotation of the testimony appearing at that page.

DFS contends that if there is a dispute in the testimony of Guiliano and Gathany then only a trial can resolve the dispute as to which testimony is credible. Even accepting Gathany's testimony as true, summary judgment in favor of Sharp is still proper. The *material* facts show that as a matter law, DFS breached its contract with Sharp. *Ward never informed Sharp that it was withholding authority for DFS's financing of goods shipped after May 28, 1997.* Furthermore, as a matter of law, the fact that Ward requested goods from Sharp in the manner in which it always had during the life of the floorplan entitled Sharp to perform consistently with its prior performance, i.e., it was authorized to finance these goods through DFS.

Thus, the court made no findings of fact or credibility determinations in granting summary judgment. DFS's disingenuous contention (implied from the negative pregnant contained in the Gathany affidavit) that starting in May 1997, each and every order placed by Ward to Sharp should have been accompanied by an express request that DFS finance the order is unavailing.

Whether There was Consideration to Support a Modification of the Agreement

DFS contends that the following three conclusions by the court are contrary to the undisputed record: (1) the Agreement between DFS and Sharp could be terminated only on 30 days notice; (2) DFS was legally obligated to provide approval numbers through May 23, 1997; and (3) by providing these numbers, DFS did not confer a benefit on Sharp.

As indicated above, all of these conclusions, accurate or not, constitute interpretations of an unambiguous contract or legal conclusions, not findings of fact. In any event, the fact that DFS was not "legally obligated" to (1) provide approval numbers, (2) provide 30 days notice of termination of the Agreement or (3) finance any particular transaction, is

immaterial. Thus, DFS's contention that in providing approval numbers on May 23, 1997, subject to the unilateral change in the mandated shipping deadline, constituted "consideration to Sharp for [DFS's] proffered modification" of the Agreement is unavailing.

As a matter of law, there was no consideration for DFS's proposed modification. As a threshold matter, this is the first time that DFS has argued that it unilaterally terminated the Agreement; DFS, in opposing the motion for summary judgment, characterized the May 23, 1997, facsimile as an "offer." Def.'s Opp. Mot. Sum. Jdgmt. at 6. I reject this claim because Rule 59(e) "does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 875-76 (7th Cir. 1996); *Weyerhauser Corp.*, 771 F.Supp. at 1419; *see also* 11 WRIGHT, ET. AL. Federal Practice and Procedure §2810.1, at 127-28 (2d ed. 1995).

Furthermore, the record shows that DFS did not terminate the Agreement, notwithstanding the fact that it undoubtedly had a right to do so. To the contrary, in the May 23 fax, DFS stated it would *continue* to finance purchases by Ward through May 23, 1997. The use of the word "continue" shows that DFS intended to act according to the original terms of the Agreement through May 23, 1997. Its further assertion that it "would revoke" approvals was without legal efficacy as a matter of law.

Again, DFS correctly asserts that the Agreement does not limit its right to refuse to finance a transaction. However, the possession of this right does not turn the issuance of approval numbers into consideration for the proposed modification in the mandated shipping deadline. Under the Agreement, DFS had the "legal obligation" either to issue an approval number or to refuse to finance the transaction; In this instance, in

legal contemplation, the power over the greater (termination) does not carry with it the power over the lesser (unilateral modification).

Elements of Sharp's Claim and DFS's Defenses

DFS argues that Sharp is not entitled to payment for the merchandise shipped after May 28, 1997 because it failed to produce any evidence showing that Ward authorized the transaction to be financed by DFS, as required by the Agreement. DFS maintains that Ward never made such a request as evidenced by Ward's letter to Sharp dated May 22, 1997, Gathany's affidavit, and the Assignment and Assumption Agreement dated April 30, 1997.

According to DFS, the May 22, 1997, letter made it clear that Ward was not requesting that Sharp finance purchases on and after May 23, 1997 through DFS. This is nonsensical for the reasons stated above. Ward's letter stated that DFS would continue to administer its floorplan financing program through May 23, 1997, but would not issue approval numbers *after* May 23, 1997. The letter actually makes it clear that DFS would continue to issue approval numbers through May 23, 1997, but not after May 23, 1997.

Gathany stated in his affidavit that Ward was requesting the financing of transactions by DFS only to the extent that the merchandise was inventoried on or before May 28, 1997. In the Assignment and Assumption Agreement, Ward requested that DFS finance orders approved on May 23, 1997 only to the extent that they were invoiced on or before May 28, 1997.

None of this shows (or even generates a genuine dispute of material fact as to whether) Sharp failed to warrant that Ward had requested that DFS finance the purchases for which approval numbers had been issued on May 23, 1997. As is made plain by the materially undisputed facts in the record,

the customary course of dealing was for Ward to order goods from Sharp without expressly stating each time that it was authorizing the financing of purchases through DFS. *Moreover, Ward never notified Sharp that it was authorizing the financing of purchases only to the extent that they could be invoiced by May 28, 1997.* Therefore, there is no way that Sharp could have or should have known that Ward had requested that orders be financed only to the extent that they were invoiced on or before May 28, 1997.

Damages Calculation

DFS alleges that Sharp failed to establish its claim to the damages awarded by the Court because it never offered evidence as to the contract damages to which it was entitled, and it failed to establish the full terms of the financing program with DFS. For the first time in its Rule 59 motion, DFS asserts that DFS was always entitled to discount the payment to Sharp by as much as two percent of the face amount of the invoice. DFS is precluded from raising this contention now because it was not raised in its Opposition to Sharp's Motion for Summary Judgment. *See id.*

Shifting of the Burden to DFS

DFS contends that the court wrongly shifted Sharp's burden of proof to DFS with regard to the defense of "frustration of purpose." DFS contends, incorrectly, that it met its burden for the purpose of summary judgment by showing that both the termination of its contract with Ward by the latter and Ward's decision to request that goods be financed only to the extent to which they could be invoiced by May 28, 1997, substantially frustrated the purpose of the contract. This is the first time DFS has asserted that Ward's decision to request that purchases be financed only to the extent that they could be invoiced by May 28, 1997 substantially frustrated the purpose of the contract. In

opposing the motion for summary judgment, DFS maintained only that Ward's termination of the contract frustrated the purpose of the contract. Accordingly, the contention is rejected. *Id.*

In any event, under the law of Illinois, which is controlling here, "the defense of commercial frustration . . . will be applied only when the defendant has satisfied two rigorous tests: (1) the frustrating event was not reasonably foreseeable; and (2) the value of counter-performance had been totally or nearly destroyed by the frustrating cause." *Farm Credit Bank v. Dorr*, 620 N.E.2d 549, 587-88 (Ill. App. Ct. 1993). Even in the context of summary judgment, the defendant still must satisfy both of these tests. *See id.* (affirming grant of summary judgment striking defendant's defense of commercial frustration). DFS has failed to project any evidence showing that the termination of the arrangement with Ward was not reasonably foreseeable. Therefore, the defense of commercial frustration fails as a matter of law.[2] Mere assertions by counsel do not avoid summary judgment.

Anticipatory Breach and Mitigation of Damages

- Anticipatory Breach

Seemingly, by equating an attempted unilateral modification of the Agreement with principles of anticipatory breach, DFS has recharacterized Sharp's theory of the case as based on anticipatory breach. *Sharp has never maintained that this case involved an anticipatory breach.* Rather, the court introduced that idea in response to the rather obscure argument DFS earlier advanced regarding mitigation of damages.

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[2] The second prong of the test is not satisfied here because DFS has never contended that the value of the counter-performance has been totally or nearly totally destroyed by the frustrating cause.

As a matter of law, as I stated in the prior Order, the letter faxed to Sharp by DFS was too ambiguous to constitute an actionable anticipatory breach. Under Illinois law, DFS would have had to have "manifest[ed] a definite and unequivocal intent not to render its performance" for the letter to constitute an anticipatory breach. *Bituminous Cas. Corp. v. Commercial Union Ins. Co.*, 652 N.E.2d 1192, 1197 (Ill. Ct. App. 1995). DFS did not state in the May 23, 1997, letter that it would refuse to pay for any goods shipped after May 28, 1997. It only stated that DFS "would revoke" each approval number for inventory not shipped by May 28, 1997. "Doubtful or indefinite statements . . . that performance may or may not take place" do not constitute anticipatory breaches. *Farwell Construction Co. v. Ticktin*, 376 N.E.2d 621 (Ill. Ct. App. 1978). The statement that DFS "would revoke" approval numbers is not a statement of a definite and unequivocal intent to refuse payment for goods shipped after May 28, 1997. As a matter of law, Sharp justifiably treated the letter as an attempted unilateral modification to which it did not give its assent.

- Mitigation of Damages

According to DFS, Sharp did not properly mitigate its damages. DFS maintains that instead of attempting to sell the inventory in question on open account to Ward, Sharp should have either refused to ship to Ward and sue DFS for lost profit on the sale or it should have attempted to obtain financing from GE Capital under its new program. In the view of DFS, Sharp took an undue risk by selling on open account to Ward. These contentions are misplaced.

The rule of law in Illinois is that "the duty to mitigate damages does not arise until the party upon whom the duty is impressed is aware of facts which make the duty to mitigate necessary." *Continental Concrete Pipe Corp. v. Century Road Builders, Inc.*, 552 N.E.2d 1032, 1042 (Ill. Ct. App.

1990). Sharp did not become aware of the breach by DFS until DFS refused to pay for the goods shipped after May 28, 1997. Therefore, Sharp could not possibly have *refused to ship goods* to Ward *which it had already shipped.*

Moreover, a duty to mitigate damages requires only that the injured party make reasonable efforts to avoid loss. *See Restatement (Second) of Contracts* § 350(2) at 126, (1979). "[T]he duty to mitigate may not be invoked by one who has breached a contract as grounds for a hypercritical examination of the injured party's conduct, or as evidence that the injured party might have taken steps which seemed wiser or would have been more advantageous to the breaching party." *Pioneer Bank & Trust Co. v. Seiko Sporting Goods,* 540 N.E.2d 808, 813 (Ill. Ct. App. 1989). It is hypercritical in the extreme for DFS to claim that Sharp did not properly mitigate its damages because Sharp chose to undertake to negotiate with Ward for payment rather than attempting to obtain financing from GEC. As a matter of law, Sharp acted reasonably in trying to obtain payment from Ward.

DFS also argues that Sharp did not properly mitigate its damages because it did not exercise its right to recall the goods shipped to Ward.[3] The record contains unrefuted evidence that in mid-June 1997, Sharp believed that it had reached an agreement with Ward for payment for the goods. Therefore it was reasonable for Sharp not to exercise its right to recall the goods (assuming such right was a practical

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[3] DFS erroneously contends that I concluded that Sharp did not have the right to repossess the goods. The statement in the prior Order that "Sharp had no right (or genuine opportunity prebankruptcy) to repossess the goods," was merely a comment on what was obvious: having reached a tentative agreement with Ward for payment, there was no motivation to pursue a possessory remedy, and once Ward had filed bankruptcy, Sharp had no right to repossess the goods. *See* January 29, 1999, Memorandum at 7 and n. 5.

possibility, which DFS has not established, in any event). Once Ward filed for bankruptcy, Sharp no longer had the right to recall the goods because of the automatic stay. Furthermore, this is yet another example of DFS's hyper criticism; it certainly would have been more advantageous to DFS if Sharp had recalled the goods immediately upon DFS's refusal of payment. However, that fact alone does not render Sharp's actions unreasonable.

Ward's Failure to Pay is the Cause of the Breach

As stated above, Sharp reasonably concluded that it had secured an agreement with Ward for payment of the goods after it received notice of DFS's refusal to pay. According to DFS, it was the risk of selling to Ward on open account that injured Sharp, and therefore DFS is not liable for any damages. However, Sharp did not sell on an open account, and would not have been required to attempt to negotiate such an arrangement (as it did, after the fact) but for the breach of contract by DFS. Indisputably, it is the refusal by DFS to abide by the terms of the Agreement that is the proximate cause of Sharp's loss.

(iv)

For the reasons set forth above, defendant's motion to vacate shall be denied. An Order follows.

Filed: April 14, 1999

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRTCT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. AMD 98-253

SHARP ELECTRONICS CORP.,
Plaintiff

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Defendant

ORDER

For the reasons stated in the foregoing Memorandum, it is this 14th day of April, 1999, by the United States District Court for the District of Maryland hereby ORDERED

(1) That Defendant's motion to alter or amend judgment is DENIED; and it is further ORDERED

(2) That the Clerk of Court TRANSMIT a copy of the foregoing Memorandum and this Order to the attorneys of record.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 99-1555

SHARP ELECTRONICS CORPORATION,
Plaintiff-Appellee,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Defendant-Appellant.

Argued: April 6, 2000

Decided: June 20, 2000

OPINION

NIEMEYER, *Circuit Judge*:

This appeal presents the question under Illinois law of whether a finance company may unilaterally modify the terms of a standing floorplan financing agreement before it agrees to finance a given transaction. Because we hold that the floorplan financing agreement in this case was a unilateral contract that did not bind the finance company until it undertook to finance a specific transaction, we conclude that the finance company could, as a condition of continuing under the arrangement, modify the terms under which it was willing to continue to finance transactions. Accordingly, we vacate the district court's judgment entered against the finance company after it refused to finance a $1.3 million transaction except on terms that it had unilaterally demanded and remand with instructions as specified herein.

I

Deutsche Financial Services Corporation ("Deutsche Financial") and Sharp Electronics Corporation ("Sharp") signed a financing agreement, entitled "Floorplan Repurchase Agreement," which provided that if Deutsche Financial would agree from time to time to finance certain transactions between Sharp and its wholesale customers, Sharp would reduce Deutsche Financial's risk by repurchasing any financed merchandise that Deutsche Financial might find necessary to repossess upon default. The agreement was unilateral in that Sharp offered Deutsche Financial inducements—specifically agreements to reduce its risk—to provide financing for ongoing transactions between Sharp and its customers, in this case Montgomery Ward & Co., Incorporated ("Montgomery Ward"), but Deutsche Financial was not obligated to provide any financing. The agreement simply invited Deutsche Financial to accept the inducements by providing the financing.

In particular the agreement provided: "To induce [Deutsche Financial] to finance the acquisition of Merchandise by any [customer of Sharp]," Sharp agrees that

> (1) It will assure that the underlying transaction is current and authentic; that the merchandise is "free and clear of all liens"; and that the merchandise is saleable;
>
> (2) It will assign to Deutsche Financial "the vendor's privilege and lien" on merchandise as granted under Louisiana law;
>
> (3) It will "repurchase such Merchandise from [Deutsche Financial] upon demand" and for specified prices whenever Deutsche Financial will have a need to repossess the merchandise from customers in default.

And while the agreement invited Deutsche Financial to finance transactions in response to Sharp's assurances, it

specifically did not require Deutsche Financial to finance any transaction, providing, "This Agreement shall in no way bind [Deutsche Financial] to finance any Merchandise for [Sharp's] retail dealers. From time to time [Sharp] will inquire as to whether [Deutsche Financial] agree[s] to finance Merchandise for certain dealers." Under the agreement, Deutsche Financial would be invited to respond to applications or "requests" made by both Sharp and Montgomery Ward. Only after Deutsche Financial approved a specific request to finance a transaction would it become obligated to complete performance under the terms of the Floorplan Repurchase Agreement by paying the invoice amount of the proposed transaction less agreed-upon finance charges. This obligation to pay, however, was conditioned on (1) Sharp's shipment of the merchandise to Montgomery Ward within 30 days of Deutsche Financial's approval and (2) Deutsche Financial's receipt of the invoice for the transaction within 10 days after delivery of the merchandise.

Underlying Deutsche Financial's willingness to approve financing under the Floorplan Repurchase Agreement for Montgomery Ward's purchases from Sharp was Deutsche Financial's independently defined role as administrator of a financial "facility" for Montgomery Ward that provided Montgomery Ward with a $100 million line of credit.

Until November 1996, the practice under the Floorplan Repurchase Agreement between Deutsche Financial and Sharp with respect to Montgomery Ward's purchases routinely took the following form: Montgomery Ward would place a purchase order for merchandise with Sharp; Sharp would call Deutsche Financial and request an approval number for the financing of the merchandise; and Deutsche Financial would, if it elected to finance the transaction and if Montgomery Ward had not yet reached its credit limit with Deutsche Financial, orally issue Sharp an approval number. In November 1996, the arrangement changed slightly.

Thereafter, Sharp would fax Deutsche Financial its financing request, and Deutsche Financial would fax its approval to Sharp. Sharp would then enter the approval number into its computer system, ship the merchandise to Montgomery Ward, and send the invoice to Deutsche Financial, which would pay Sharp.

In early May 1997, in response to its deteriorating financial condition, Montgomery Ward met with its suppliers to discuss its condition and its plans to restructure. As part of these plans, Montgomery Ward announced its intention to transfer the administration of its line of credit from Deutsche Financial to General Electric Capital Corporation, a shareholder of Montgomery Ward. Upon the accomplishment of that transfer, Deutsche Financial would no longer be financing any Montgomery Ward purchases, including those from Sharp. No representative of Sharp attended this meeting, but Sharp's general manager learned of it later. He also was aware that General Electric Capital had been "getting more involved" with Montgomery Ward and that it might "step in either as the lender or the administrator of the floor plan program." Based on this knowledge, Sharp's general manager recognized the possibility that Sharp "would be requested to do something different" with regard to the financing of its sales to Montgomery Ward.

Sharp first received formal notice of a change in Montgomery Ward's financing arrangements on May 22, 1997, when Montgomery Ward faxed it a letter stating: "Effective May 23, 1997, the administrator on the inventory finance facility is being changed from Deutsche Financial Services to GE Capital. Deutsche will not issue approval numbers after May 23, 1997. . . . A copy of GE Capital's boilerplate Inventory Repurchase Agreement will be faxed to you on Friday, May 23, 1997." On May 23, 1997, Deutsche Financial also faxed a letter to Sharp, which Sharp received at 2:17 p.m., announcing the termination of its financing role

and setting deadlines for future transactions in light of that termination. Deutsche Financial's fax, which was entirely consistent with Montgomery Ward's fax, stated in pertinent part:

> Per Montgomery Ward's request, the financing program between [Deutsche Financial and] Montgomery Ward . . . will change administrators on May 23, 1997, 5:00 PM CST. [Deutsche Financial] will continue to review your requests for approval numbers until such time, and will continue to administer the Program for any invoices dated May 28, 1997 and earlier. However, any requests for approvals after May 23, 1997 should be processed through General Electric Capital Corporation . . . who will act as the new administrator of the Program.
>
> As [Deutsche Financial] will not administer any invoices dated later than May 28, 1997, [Deutsche Financial] hereby notifies you that [Deutsche Financial] will revoke each approval number which [Deutsche Financial] has issued for inventory which you have not shipped to Montgomery Ward . . . on or before such date.

For purposes of this case, the important change announced by Deutsche Financial in its May 23 fax was the shortened shipping deadline requiring that merchandise be shipped to Montgomery Ward by May 28, rather than within 30 days of financing approval. Although both Montgomery Ward's May 22 fax and Deutsche Financial's May 23 fax were sent to Sharp's general manager, it was Sharp's credit administrator who, on May 23, undertook ongoing correspondence about specific transactions with his counterpart at Deutsche Financial. Sharp's credit administrator states that on May 23 he remained unaware of the faxes from Montgomery Ward and Deutsche Financial announcing the termination of Deutsche Financial's financing role.

Five minutes after Deutsche Financial sent its fax to Sharp's general manager changing the terms under which it

would continue to finance transactions, Deutsche Financial faxed Sharp's credit administrator an approval to finance merchandise worth $56,683, for which Sharp had submitted a request for financing approval four days earlier. In this routine fax to Sharp, Deutsche Financial did not make reference to any of the changes transmitted earlier to Sharp's general manager. Less than 30 minutes later, at 2:44 p.m., Sharp's credit administrator submitted a new request to Deutsche Financial to approve financing for almost $2.2 million worth of merchandise that Montgomery Ward had ordered. Later that same day, at 4:05 p.m., Deutsche Financial returned a fax approving the financing of this $2.2 million transaction. Again, Deutsche Financial's approval did not make reference to the changes in the financing arrangement.

Because Sharp's general manager had been on vacation on May 23, 1997, he did not see the two faxes, one from Montgomery Ward and the other from Deutsche Financial, announcing changes in the financing relationship, until May 27. On that day, after reading Deutsche Financial's May 23 fax, Sharp's general manager discussed the changes in financing procedures with Sharp's credit administrator, although the general manager later conceded he "wasn't focused" on the statement in Deutsche Financial's letter notifying Sharp that Deutsche Financial would "revoke each approval number which it has issued for inventory which [Sharp has] not shipped to Montgomery Ward . . . on or before [the May 28 deadline]."

On May 28, Sharp shipped Montgomery Ward $945,488 worth of merchandise that had been approved for financing by Deutsche Financial on May 23. The remaining $1.3 million worth of merchandise that had also been approved on May 23 was shipped on May 31, three days after the deadline imposed by Deutsche Financial in its May 23 fax. When Sharp submitted invoices for these two shipments, Deutsche Financial financed the merchandise shipped on May 28 but

refused to finance the shipment made on May 31. Because Montgomery Ward later defaulted on its obligation to pay Sharp for the merchandise and subsequently filed for bankruptcy, Sharp was not paid for approximately $1.3 million worth of merchandise.

In January 1998, Sharp filed this diversity-jurisdiction action against Deutsche Financial for breach of the Floorplan Repurchase Agreement. It alleged that it had complied with the agreement and that Deutsche Financial's attempted modification of the agreement on May 23, 1997, was invalid. Sharp demanded more than $1.3 million in damages, the value of the merchandise shipped on May 31, 1997, plus interest and costs.

On Sharp's motion for summary judgment, the district court entered judgment in favor of Sharp in the amount of $1,394,705.11, which included approximately $97,000 of prejudgment interest. In ruling in Sharp's favor, the court concluded that Deutsche Financial had breached the Floorplan Repurchase Agreement with Sharp. The district court, applying Illinois law because Deutsche Financial had received and approved Sharp's request to finance the $2.2 million transaction (which included the $1.3 million shipment) in that state, ruled that the agreement between the parties had not been effectively modified because a valid modification requires an offer, acceptance, and consideration. The court found that in the circumstances before it: (1) Deutsche Financial's attempted modification was not supported by valid consideration because Deutsche Financial had preexisting obligations, and (2) Sharp had not accepted Deutsche Financial's offer by performance because Sharp's actions were consistent with the preexisting agreement. In response to Deutsche Financial's argument that Sharp had failed to mitigate its damages by shipping the merchandise to Montgomery Ward after the May 28 deadline with full knowledge of the deadline, the court concluded that Deutsche

Financial had not notified Sharp in its May 23 fax of an unequivocal intention to breach the existing arrangement.

This appeal followed.

II

In the broadest view, the Floorplan Repurchase Agreement in this case was an agreement between the parties establishing the underlying terms that would apply if and when Deutsche Financial agreed to finance a transaction. Until Deutsche Financial "approved" a transaction for financing, it had no obligation to finance any transaction. Similarly, Sharp had no obligation to request Deutsche Financial's financing, although it did have the obligations set forth in the Floorplan Repurchase Agreement if Deutsche Financial approved a request. Thus, even if Sharp met all the criteria established for approval of a transaction, it could not compel Deutsche Financial to agree to finance any transaction; it could not even demand an explanation if Deutsche Financial refused to approve a transaction.

Stated otherwise, the Floorplan Repurchase Agreement was a set of terms offered by Sharp to "induce"—the term used in the document—Deutsche Financial to agree to finance transactions by reducing Deutsche Financial's credit risk and shifting some of that risk to Sharp through Sharp's agreement to repurchase repossessed inventory, hence the agreement's title, Floorplan Repurchase Agreement. Deutsche Financial's risk was also lessened by Sharp's assurances that a current, bona fide transaction was being financed; that the merchandise being financed was saleable; and that Sharp would assign certain vendor's rights to Deutsche Financial.

In contractual terms, the Floorplan Repurchase Agreement was a unilateral promise by Sharp that invited Deutsche Financial's acceptance by performance—i.e., by financing transactions. Traditionally, this type of arrangement is characterized as a unilateral contract, a contract in which the

promise is binding only on the promisor. *See, e.g., Central Nat'l Bank & Trust Co. v. Consumers Constr. Co.*, 5 Ill.App.3d 274, 282 N.E.2d 158, 162 (1972) (recognizing that a unilateral contract may be accepted by performance); E. Allan Farnsworth, Contracts §3.4, at 115 (2d ed. 1990) ("In forming a unilateral contract only one party makes a promise: the offeror makes the promise contained in the offer, and the offeree renders some performance as acceptance"); 1 Samuel Williston, A Treatise on the Law of Contracts § 1:17, at 44-46 (Richard A. Lord ed., 4th ed. 1990). But, because this "unilateral" classification has often produced confusion in the analysis of hybrid situations, the Restatement (Second) of Contracts has abandoned rigid characterizations based on the term and has described the traditional unilateral contract in other ways under various subjects. *See*, e.g., Restatement (Second) of Contracts § 1 cmt. f (1981) (Reporter's Note) (explaining that because "unilateral contract" traditionally referred to three different types of transactions, the term was "productive of confusion"); *id.* § 25 (option contracts); id. § 30(1) (offers inviting acceptance by performance); *see also Lomas Mortgage U.S.A., Inc. v. W.E. O'Neil Constr. Co.*, 812 F.Supp. 841, 843 (N.D.Ill. 1993) (citing Illinois cases that rely on the Restatement (Second) of Contracts and noting that Illinois courts "custòmarily" follow them). The flexible approach recommended by the Second Restatement, while more adaptable to various types of transactions, does not abandon the traditional notion that under a unilateral contract, as long as the promisor holds open his offer inviting acceptance by performance, the promisee can bind the promisor by such performance. *See* Restatement (Second) of Contracts § 53(1) (acceptance by performance); *id.* § 54(1) (when offer is accepted by performance, no notification of acceptance required); see also 1 Williston § 1:17, at 45. While principles of "purely" unilateral contracts are most often applied to offers of a reward or of a price for goods or services, id. § 1:17, at 44-45, they also apply to financing,

such as credit-card financing, where the finance company, through the provision of an underlying unilateral agreement, makes an offer to finance its customer's purchases of merchandise if the customer uses the card. Until the customer uses the card, the finance company may cancel its financing offer. But once a customer uses the card to make a purchase, the finance company becomes obligated to finance that purchase. *See Garber v. Harris Trust & Say. Bank*, 104 Ill.App.3d 675, 60 Ill.Dec. 410, 432 N.E.2d 1309, 1311 (1982) (holding that issuance of a credit card is only an offer to extend credit, which is accepted upon each purchase by credit-card owner).

These well-established contract principles readily describe and govern this case. Until Deutsche Financial accepted Sharp's offer by beginning its performance, i.e., by agreeing to finance a transaction, Sharp could have withdrawn from the arrangement or altered the terms of its offer to Deutsche Financial. And this freedom from obligation continued even after Sharp submitted a request for approval, so long as Deutsche Financial had not given its approval. *See, e.g., Andros v. Hansen Realty Co.*, 44 Ill.App.3d 635, 3 Ill.Dec. 266, 358 N.E.2d 664, 667 (1976) ("a unilateral agreement can be cancelled at any time before performance by the other party"). Similarly, at any time before its approval, Deutsche Financial could have demanded different assurances or terms as a condition to future financing. If Sharp refused, Deutsche Financial could have correspondingly refused to finance any transaction and withdrawn from the arrangement. *See, e.g., Western Springs Park Dist. v. Lawrence*, 343 Ill. 302, 175 N.E. 579, 580 (1931) (recognizing that offer is not binding until acceptance). Until Deutsche Financial approved a specific request, either party could cancel the arrangement or condition its participation in future transactions.

When Deutsche Financial approved a transaction for financing, however, it began its performance, thereby

accepting Sharp's offer and binding Sharp to the terms of the offer. Deutsche Financial similarly bound itself to complete performance by agreeing to finance the transaction under the terms of the underlying arrangement. The Floorplan Repurchase Agreement makes this explicit:

> Upon [Deutsche Financial's] approval to provide such financing, via telephone or other means, [Deutsche Financial] will be obligated to pay [Sharp] an amount equal to the invoice price for such Merchandise, less the amount of [Deutsche Financial's] charges as agreed upon from time to time, if the Merchandise is shipped to the dealer within thirty (30) days from the date of [Deutsche Financial's] approval and [Deutsche Financial has] received[Sharp's] invoice for such Merchandise within ten (10) days from the date of delivery of the Merchandise to the dealer.

(Emphasis added). While Deutsche Financial, with its approval of Sharp's request, became obligated to finance the transaction, its completion of performance—its payment for the merchandise—was nevertheless required only if (1) Sharp shipped the merchandise to Montgomery Ward within 30 days of its approval and (2) Deutsche Financial received an invoice for the merchandise within 10 days after delivery.

In the parlance of contract law, Deutsche Financial's obligation to complete performance—by financing the transaction after its approval—was subject to conditions. The Restatement defines a condition as "an event, not certain to occur, which must occur . . . before performance under a contract becomes due" and notes that "[p]erformance of a duty subject to a condition cannot become due unless the condition occurs." Restatement (Second) of Contracts §§ 224, 225(1). As such, although Deutsche Financial's approval constituted acceptance through performance, such approval was merely partial performance, and Deutsche Financial's

complete performance was conditional on additional acts by Sharp. *See Vuagniaux v. Korte*, 273 Ill.App.3d 305, 210 Ill.Dec. 38, 652 N.E.2d 840, 842-43 (1995) (discussing conditions which, if not fulfilled, preclude contractual liability).

On May 23, 1997, before Deutsche Financial approved any transaction and therefore before it became obligated to do anything under the Floorplan Repurchase Agreement, Deutsche Financial announced that any future financing would be subject to new conditions—pertinently, the requirement of shipment within 30 days became a requirement of shipment by May 28. Because this May 23 fax controlled Deutsche Financial's future acceptance of Sharp's standing offer (represented by the Floorplan Repurchase Agreement) and because Deutsche Financial purported to condition acceptance of the offer on the condition that its changes be made, the May 23 fax must be treated as a rejection of Sharp's standing offer and as a counteroffer on new terms. *See Hubble v. O'Connor*, 291 Ill.App.3d 974, 225 Ill.Dec. 825, 684 N.E.2d 816, 821 (1997) ("An acceptance conditioned on the modification of terms in an offer generally constitutes a rejection of the offer and becomes a counteroffer that the original offeror must accept before a valid contract is established"); Restatement (Second) of Contracts § 59 ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer"); *id.* § 36(1)(a) (indicating that a counteroffer by the offeree may terminate the offeree's power to accept the original offer); *id.* § 39 (defining a counteroffer as "an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer").

The role of the Floorplan Repurchase Agreement as a standing offer to enter into a number of financing contracts

does not alter this analysis. See Restatement (Second) of Contracts § 31 ("An offer may propose . . . the formation of a number of contracts by successive acceptances from time to time"). This is because individual contracts formed on the underlying offer for multiple contracts are analyzed individually as divisible contracts. *See* Restatement (Second) of Contracts § 47 (indicating that a standing offer contemplating "a series of independent contracts" may be revoked "so as to terminate the power to create future contracts," even though other contracts have already been entered into pursuant to the standing offer); *see also King Bros. Engineering Works v. Whiting Corp.*, 320 Ill.App. 630, 51 N.E.2d 1004, 1008 (1943) ("an offer of . . . divisible character may be revoked not only before any acceptance but also as to any portion of the offer still unaccepted").

The nature of Deutsche Financial's counteroffer included in the May 23 fax was clear. Deutsche Financial was terminating its underlying financing relationship with Montgomery Ward and would no longer approve transactions for financing after May 23. Deutsche Financial further indicated that it would not finance any transaction with an invoice date or shipment date after May 28. In essence, Deutsche Financial was offering to continue for a short time under the underlying Floorplan Repurchase Agreement as long as its new conditions applied, and it was inviting Sharp and Montgomery Ward to submit new transactions for financing subject to those conditions. In contract language, Deutsche Financial extended a counteroffer to Sharp that could be accepted by Sharp's performance—i.e., by Sharp's further submission of financing requests.

The legal effect of Deutsche Financial's May 23 counteroffer was rejection of Sharp' s standing offer, which terminated Deutsche Financial's ability to bind Sharp on the original terms. *See* Restatement (Second) of Contracts § 36; *see also On Tap Premium Quality Waters, Inc. v. Bank of N.*

Ill., 262 Ill.App.3d 254, 199 Ill.Dec. 586, 634 N.E.2d 425, 429 (1994) ("It is well established that an acceptance requiring any modification or change of terms constitutes a rejection of an original offer"); *Sementa v. Tylman*, 230 Ill.App.3d 701, 172 Ill.Dec. 327, 595 N.E.2d 688, 692 (1992) ("A rejected offer cannot be revived by a later acceptance"). Thus, the original terms of the Floorplan Repurchase Agreement were terminated, and neither party could unilaterally revive it.

Deutsche Financial's May 23 rejection of the standing offer in the Floorplan Repurchase Agreement and its termination of its own power of acceptance occurred upon Sharp 's receipt of the counteroffer from Deutsche Financial, not when knowledge of the communication's contents could be imputed to the addressee or anyone else. *See* Restatement (Second) of Contracts § 40 (counteroffer terminates the power of acceptance when "received" by the original offeror); *id.* § 68 (receipt occurs when the "writing comes into the possession of the person addressed, or some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him"). Identifying receipt as the objective manifestation of when rejection occurs is necessary for determining contracting liability. It permits an offeror an objective mechanism to revoke an offer and, similarly, permits an objective mechanism by which an offeree can reject an offer. In these circumstances, receipt leads not to the formation of a contract, but to its demise, and therefore, knowledge of the contents of a communication, which otherwise might be necessary for a meeting of minds to form a contract, need not be imputed to the parties for the revocation or rejection of an offer to become effective.

In sum, Deutsche Financial effectively rejected the standing Floorplan Repurchase Agreement—which may

essentially be understood as a termination unless Sharp agreed to new conditions—at 2:17 p.m. on May 23 when the fax was received by Sharp, addressed to its general manager. This was the person with whom communications between the companies regarding the terms of the Floorplan Repurchase Agreement had taken place; the general manager was also the person to whom Montgomery Ward sent its fax a day earlier announcing the termination of its relationship with Deutsche Financial. See Restatement (Second) of Contracts § 68 & cmt. a (noting that receipt of a communication does not require that it have been read or even that it have reached the hands of the addressee). Thus, unless Sharp thereafter acceded to the new conditions demanded by Deutsche Financial—or, stated otherwise, unless Sharp accepted Deutsche Financial's counteroffer of May 23—the Floorplan Repurchase Agreement came to an end on May 23 when Sharp received Deutsche Financial's fax.

Sharp does not appear to take issue with this conclusion. It agrees that Deutsche Financial's May 23 fax contained a counteroffer but argues that it never agreed to the new conditions contained in the fax. Sharp's core argument is that it cannot be deemed to have accepted Deutsche Financial's counteroffer without an awareness of the fax's contents. It contends that at the time it requested Deutsche Financial's approval for ongoing financing later on May 23, it did not have effective notice of the modifications demanded by Deutsche Financial. In support of this contention, Sharp gives three reasons why notice was defective. First, Sharp contends that notice of the counteroffer was inadequate because it was received less than one-half hour before Sharp requested approval for the $2.2 million transaction. Second, it points out that Deutsche Financial's fax was sent to Sharp's general manager, whereas it was Sharp's credit administrator who processed financing approvals. Finally, it notes that the general manager, to whom the May 23 fax was sent, did not

receive actual notice of it until four days later, on May 27 when he returned from vacation.

Sharp may have identified a legitimate factual question about whether it had effective notice of the contents of Deutsche Financial's counteroffer so as to be able to accept it by performance that same day. This factual issue, however, need not be resolved. Rather, because of Sharp's actual knowledge of the counteroffer on May 27 and its performance thereafter in shipping $2.2 million worth of merchandise to Montgomery Ward, this case may be decided as a matter of law on an established principle of contract law.

When an offeree, who has performed partly, continues performance requested by the offer after learning of the offer, it accepts the offer by completing the requested performance, even if it did not know of the offer when it first began to perform. *See* Restatement (Second) of Contracts § 51 ("Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance"); *see also Plumb v. Campbell*, 129 Ill. 101, 18 N.E. 790, 792 (1888) (party can be bound to unilateral contract "in [any] of three ways: First, by . . . engaging within a reasonable time to perform the contract on his part; second, by beginning such performance in a way which would bind him to complete it; and, third, by actual performance"); *In re Marriage of Sherrick*, 214 Ill.App.3d 92, 157 Ill.Dec. 917, 573 N.E.2d 335, 337 (1991) ("Conduct, including an acceptance of benefits under a contract, may be sufficient to constitute a ratification binding on the party accepting the benefits as if the party had signed the contract"). This principle embodied in § 51 of the Restatement resolves the case at hand. Even if Sharp began the performance invited by Deutsche Financial's counteroffer by requesting the $2.2 million of financing without knowledge that the "old deal" had been terminated and that

new conditions had been demanded, its core actions continuing performance in the manner invited by the offer—i.e., the shipping of merchandise—occurred after it had actual knowledge of Deutsche Financial's counteroffer. Sharp does not dispute that by May 27, its general manager had actually read Deutsche Financial's fax and discussed it with Sharp's credit administrator. And at that point, Sharp could have withdrawn from Deutsche Financial's proposed arrangement and refused to ship any merchandise without risk. Sharp's general manager had become aware that the old deal was done and that Sharp could continue only under the counteroffer. But instead of indicating its nonagreement with the counteroffer, Sharp began shipping all of the merchandise covered by the approved $2.2 million transaction, with full notice of Deutsche Financial's May 28 deadline. Some merchandise was shipped on May 28 within the deadline, but $1.3 million worth of merchandise was shipped on May 31, after the May 28 deadline. In short, the record indisputably establishes that at the time Sharp began shipping the $2.2 million worth of merchandise to Montgomery Ward—$1.3 million worth of which it seeks reimbursement in this suit—it had actual notice of Deutsche Financial's counteroffer. Nevertheless, it elected to continue its performance, thereby accepting that counteroffer.

Accordingly, we hold that the financing that was approved after Sharp received Deutsche Financial's May 23 fax is governed by the terms of the May 23 fax and that Deutsche Financial therefore did not breach the Floorplan Repurchase Agreement when it refused to finance the $1.3 million worth of merchandise Sharp shipped after May 28, contrary to the conditions offered on May 23 and accepted by Sharp's continuing performance.

The equities of this situation also militate against any different conclusion. Sharp was aware that Deutsche Financial was withdrawing its financial support from Mont-

gomery Ward and that General Electric Capital Corporation might replace it. Sharp also received actual notice on May 27, if not before, that the transition from Deutsche Financial to General Electric Capital would be effective May 28 and that Deutsche Financial would not be financing any shipments made after that date. Sharp thus plainly assumed the risk that Montgomery Ward would not be able to pay for the merchandise that it had ordered and that Sharp shipped on May 31. The fact that Sharp consciously undertook that risk is indicated by further unrelated transactions for the sale of merchandise that Sharp entered into directly with Montgomery Ward after May 28. It would challenge any notion of fairness to let Sharp shed the risk it assumed of Montgomery Ward's poor credit now that Montgomery Ward has filed a petition in bankruptcy.

Our determination that Deutsche Financial was not contractually obligated to finance the $1.3 million worth of merchandise, which formed the basis for Sharp's claim, leads to the legal conclusion that, on Sharp's complaint and the undisputed facts of record, Deutsche Financial is entitled to judgment as a matter of law. Accordingly, we vacate the district court's judgment and remand with instructions to enter judgment in favor of Deutsche Financial.

VACATED AND REMANDED WITH INSTRUCTIONS

APPENDIX D

[FILED July 18, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1555
CA-98-253-AMD

SHARP ELECTRONICS CORPORATION
Plaintiff-Appellee,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION
Defendant–Appellant.

ORDER

The appellee has has filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
PATRICIA S. CONNOR
CLERK